A

Dato' Sreesanthan a/l Eliathamby v Public Prosecutor

B

HIGH COURT (KUALA LUMPUR) — NOTICE OF MOTION NOS WA-44–6–01 OF 2019, WA-44–7–01 OF 2019 AND WA-44–8–01 OF 2019
ROZANA ALI J
26 AUGUST 2019

C

Criminal Procedure — Disclosure of information — Summons to produce — Applicant sought for order of discovery for public prosecutor and Securities Commission to produce and/or deliver all statements recorded during investigation — Whether application for revision on issue of discovery ought to be allowed — Criminal Procedure Code s 51

D

Criminal Procedure — Prosecution — Consent — Charges instituted pursuant to consent form by Deputy Public Prosecutor — Whether consent to institute prosecution valid — Whether application for revision on issue of consent ought to be allowed — Criminal Procedure Code s 376(3) — Securities Industries Act 1983 s 126(1)

E

Statutory Interpretation — Construction of statutes — Repeal — Effect of saving clauses in later statute — Whether offences under Securities Industries Act 1983 had been saved by Capital Markets and Services Act 2007 — Whether application for revision on issue of repealed law ought to be allowed — Capital Markets and Services Act 2007 s 390 — Interpretation Acts 1948 & 1967

F

G

This was a criminal revision application by the applicant against the decision of the sessions court judge ('SCJ') where the SCJ held that there were no merits in the criminal application in striking out the two charges against him. This motion was to set aside the order of the SCJ and for a stay pending the full and final disposal of this application. There were three applications by the applicant for revision: (a) the consent motion ie the two charges which were under s 89E(2)(a) Securities Industries Act 1983 ('the SIA') be dismissed and/or struck forthwith as being instituted under a consent that was invalid, null and void in law and the applicant be acquitted and discharged in respect of the charges; (b) the repealed law motion ie the two charges both under s 89E(2)(a) of the SIA be dismissed and/or struck forthwith as charges under a repealed law and therefore void in law and the applicant be acquitted and discharged in respect of the charges; and (c) the document motion ie a summon be issued to

H

I

A the Securities Commission ('the SC') and public prosecutor to produce and/or deliver all statements recorded during the investigation that resulted in the two charges.

Held, disallowing the motions and affirming the order of the SCJ:

B (1) It was trite law that the consent to institute the prosecution given to the Deputy Public Prosecutor ('the DPP') was valid and constitutional. It was clear from the reading of s 126(1) of the SIA that it did not mention that the public prosecutor must exercise such power personally. With the C reading of s 126(1) of the SIA and s 376(3) of the Criminal Procedure Code ('the CPC') was very clear and without any ambiguity that the consent to institute the prosecution need not to be exercised personally by the public prosecutor. The application for revision on the issue of consent for the dismissal or striking out of the two charges was D unsustainable and had no merit (see paras 13–14).

(2) From the reading of s 390(1) and (2) of the Capital Markets and Services Act 2007 ('the CMSA') as a whole, it was apparent that the offences under the SIA had been saved and adequately saved by the CMSA. The saving provision did relate to the substantive issue of the offences under the SIA. E There was no merit in the applicant's contention that there was a conflict or inconsistency between ss 381(2) and 390 of the CMSA as to the scope of the repeal of the SIA. The offence under s 89E of the SIA was still reflected in s 188 of the CMSA. The offences under the CMSA were the mirror of the offences under the repealed SIA. Therefore, the consent by F the DPP was still valid, although SIA was repealed, by virtue of s 390 of the CMSA. Thus, the application for revision on the issue of repealed law for the dismissal or striking out of the two charges was also unsustainable and had no merit (see paras 30–33).

G (3) The application by the applicant was to excess the investigation statement to prepare for his defence. One settled principle attached to the application for discovery under s 51 of the CPC was that, at this pre-trial stage, a roving and fishing inquiry for evidence was not permissible. The case of *Siti Aisyah v Public Prosecutor* [2019] 4 MLJ 46 was not applicable H since the application was made before the commencement of the inquiry or trial, as in the present case. The request must be directed at a specific document where in this case the applicant failed to do so. Accordingly, the revision of this motion of discovery of investigation statements was disallowed (see paras 39–41).

I **[Bahasa Malaysia summary**

Ini adalah permohonan semakan jenayah oleh pemohon terhadap keputusan hakim mahkamah sesyen ('HMS) di mana HMS memutuskan bahawa tidak

ada merit dalam permohonan jenayah dalam membatalkan dua pertuduhan terhadapnya. Usul ini adalah untuk mengetepikan perintah HMS dan untuk penangguhan sementara menunggu pelupusan penuh dan akhir permohonan ini. Terdapat tiga permohonan oleh pemohon untuk semakan: (a) usul kebenaran iaitu dua pertuduhan di bawah s 89E(2)(a) Akta Perindustrian Sekuriti 1983 ('APS') untuk ditolak dan/atau dibatalkan kerana dimulakan berdasarkan kebenaran yang tidak sah dan batal dalam undang-undang dan pemohon untuk dilepaskan dan dibebaskan berkenaan dengan tuduhan tersebut; (b) usul undang-undang yang dimansuhkan iaitu kedua-dua pertuduhan di bawah s 89E(2)(a) APS ditolak dan/atau dibatalkan kerana pertuduhan di bawah undang-undang yang dimansuhkan dan oleh itu tidak sah dalam undang-undang dan pemohon dilepaskan dan dibebaskan berkenaan dengan pertuduhan; dan (c) usul dokumen iaitu saman dikeluarkan kepada Suruhanjaya Sekuriti ('SS') dan pendakwa raya untuk mengemukakan dan/atau menyampaikan semua pernyataan yang direkodkan semasa penyiasatan yang mengakibatkan dua pertuduhan tersebut.

Diputuskan, tidak membenarkan usul dan mengesahkan perintah HMS:

(1) Adalah undang-undang mantap bahawa kebenaran untuk memulakan pendakwaan diberikan kepada Timbalan Pendakwa Raya ('TPR') adalah sah dan berperlembagaan. Adalah jelas daripada pembacaan s 126(1) APS bahawa ia tidak menyebutkan bahawa pendakwa raya mesti menggunakan kuasa tersebut secara peribadi. Dengan pembacaan s 126(1) APS dan s 376(3) Kanun Tatacara Jenayah ('KTJ') sangat jelas dan tanpa keraguan bahawa kebenaran untuk memulakan pendakwaan tidak perlu dilaksanakan secara peribadi oleh pendakwa raya. Permohonan untuk semakan mengenai isu kebenaran untuk penolakan atau pembatalan daripada dua pertuduhan itu tidak dapat dikekalkan dan tidak mempunyai merit (lihat perenggan 13–14).

(2) Dari pembacaan s 390(1) dan (2) Akta Pasaran Modal dan Perkhidmatan 2007 ('APMP') secara keseluruhan, jelas bahawa kesalahan di bawah SIA telah diselamatkan dan diselamatkan dengan secukupnya oleh APMP. Peruntukan kecualian itu berkaitan dengan isu utama kesalahan di bawah SIA. Tidak ada merit dalam pendapat pemohon bahawa terdapat konflik atau percanggahan antara ss 381(2) dan 390 APMP mengenai skop pemansuhan SIA. Kesalahan di bawah s 89E SIA masih tercermin dalam s 188 APMP. Kesalahan di bawah APMP adalah cermin dari kesalahan di bawah SIA yang dimansuhkan. Oleh itu, kebenaran oleh TPR masih sah, walaupun SIA telah dimansuhkan, berdasarkan s 390 APMP. Oleh itu, permohonan untuk semakan mengenai isu undang-undang yang dimansuhkan untuk penolakan atau pembatalan dua pertuduhan itu juga tidak dapat dikekalkan dan tidak mempunyai merit (lihat perenggan 30–33).

(3) Permohonan oleh pemohon adalah untuk melampaui pernyataan penyiasatan untuk menyediakan pembelaannya. Satu prinsip yang tersemat pada permohonan penemuan di bawah s 51 KTJ adalah bahawa, pada peringkat pra-perbicaraan ini, siasatan berkeliaran dan memancing untuk bukti adalah tidak dibenarkan. Kes *Siti Aisyah v Public Prosecutor* [2019] 4 MLJ 46 adalah tidak terpakai kerana permohonan itu dibuat sebelum bermulanya siasatan atau perbicaraan, seperti dalam kes ini. Permintaan mesti ditujukan pada dokumen tertentu di mana dalam hal ini pemohon gagal melakukannya. Oleh itu, semakan usul penemuan pernyataan penyiasatan adalah tidak dibenarkan (lihat perenggan 39–41).]

Cases referred to

Abdul Hamid v PP [1956] 1 MLJ 231; [1956] 1 LNS 3 (refd)
Dato' Seri Anwar bin Ibrahim v PP [2010] 2 MLJ 312; [2010] 4 CLJ 265, FC (refd)
Husdi v PP [1979] 2 MLJ 304; [1980] 1 LNS 33 (refd)
Johnson Tan Han Seng v PP & associated appeals [1977] 2 MLJ 66; [1977] 1 LNS 38, FC (refd)
Ong Lock Mui v DPP [1972] 1 MLJ 73 (refd)
Pai San & Ors v PP [2002] 4 MLJ 538; [2002] 4 CLJ 547, CA (refd)
PP v Dato' Seri Anwar bin Ibrahim [2014] 1 MLJ 633; [2014] 1 CLJ 354, CA (refd)
PP v Low Ah Sang [1962] 1 MLJ 13 (refd)
PP v Mohd Noor bin Jaafar [2005] 6 MLJ 745; [2006] 1 CLJ 103, HC (refd)
Siti Aisyah v PP [2019] 4 MLJ 46; [2019] 1 LNS 353, CA (refd)
Syed Abu Bakar bin Ahmad v PP [1982] 2 MLJ 186; [1984] 1 CLJ Rep 368 (refd)
Tengku Dato' Kamal Ibni Sultan Sir Abu Bakar & Ors v Bursa (M) Securities Bhd and another appeal [2013] 1 MLJ 158, CA (refd)

Legislation referred to

Capital Markets and Securities Act 2007 ss 188(2), 381, 381(2), 390, 390(1), (2)
Court of Judicature Act 1964 ss 31, 35
Criminal Procedure Code ss 51, 323, 325, 376(3), (3A)
Futures Industry Act 1993
Income Tax Act 1967
Income Tax Ordinance 1947 (repealaed by Income Tax Act 1967) ss 61A, s 77 90(1), (2)
Interpretation Acts 1948 and 1967 ss 17A, 28, 29, 30, 31, 32, 33, 156
Security Industry Act 1983 ss 89E, 89E(2)(a), (4), 126, 126(1)

Steven Thiru (Gregory Das with him) (Steven Thiru & Sudhar Partnership) for the applicant.

Halsey Tajuddin (Munira Masood with him) (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Rozana Ali J:

BACKGROUND

[1] This is a criminal revision application by the applicant against the decision of the session court judge ('SCJ') dated on 26 July 2018 where the SCJ held that there were no merits in the Criminal Application No 64–103–09 of 2012 in striking out the two charges against him in the Criminal Case No 62–577–07 of 2012.

[2] This motion before me is to set aside the order of the learned SCJ and for a stay pending the full and final disposal of this application.

[3] Before me there are three applications by the applicant for revision:

(a) No WA-44–6–01 of 2019 (the consent motion). The two charges which are under s 89E(2)(a) of the Security Industry Act 1983 Act 280 ('the SIA') be dismissed and/or struck forthwith as being instituted under a consent dated 18 July 2012 that is invalid, null and void in law. The applicant be acquitted and discharged in respect of the charges;

(b) No WA-44–7–01 of 2019 (the repealed law motion). The two charges both under s 89E(2)(a) of the Security Industry Act 1983 be dismissed and/or struck forthwith as charges under a repealed law and therefore void in law and the applicant be acquitted and discharged in respect of the charges; and

(c) No WA-44–8–01 of 2019 (the document motion). A summon be issued to Securities Commission ('SC') and public prosecutor to produce and/or deliver all statements recorded during the investigation that resulted in the two charges.

POWER OF REVISION

[4] The High Court's power of revision clearly spelled out in sss 31 and 35 of the Court of Judicature Act 1964 ('the CJA') and ss 323 and 325 Criminal Procedure Code ('the CPC'). I am reminded that in a revision, the main question to be considered is whether substantial justice has been done or will be done and whether any order made by the lower court should be interfered, only in very exceptional circumstances, to prevent a miscarriage of justice and confined myself to errors of law and procedure only.

NO WA-44–6–01 OF 2019 — THE CONSENT MOTION

[5] The applicant contended that the two charges were instituted pursuant to the consent form dated 18 July 2012 by the deputy public prosecutor ('DPP') and not the public prosecutor ('PP') as required under s 126(1) of the SIA and s 376(3) and (3A) of the CPC. The consent was sought by the SC was issued on 18 July 2012 after the repeal of the SIA and the coming into force of the CMSA on 24 September 2009.

[6] The applicant submitted that the consent is bad in law as not being issued by the PP personally since s 126 of the SIA stipulates that the institution of any prosecution can only be done with the consent in writing of the PP whilst the conduct of such prosecution can be done by any officer authorised in writing by the PP. The SIA does not provide that the institution of any prosecution under the Act can be done by a person authorised in writing by the PP or to whom the PP has delegated that power.

[7] The applicant also submitted that although the PP had the right or power to institute criminal proceedings against the applicant at the request of the SC under the SIA before the commencement of CMSA as the offence were allegedly committed in April 2007, but such right or power was only exercised in 18 July 2012 after the effective date of the CMSA. Therefore, the consent form have not been issued under s 126 of the SIA and this causes a miscarriage of justice.

[8] In *Pai San & Ors v Public Prosecutor* [2002] 4 MLJ 538; [2002] 4 CLJ 547, the Court of Appeal of the view that:

> In our view, the judgments of the courts have been quite consistent. A provision giving the power to institute, conduct or discontinue a proceeding for an offence is unconstitutional and void if it is exercisable independently of, or if it is parallel to the powers vested in the public prosecutor by art 145(3) of the Federal Constitution. Any authorisation given pursuant to such (void) provision is void and the prosecution instituted and conducted by a person so authorised is void. However, so long as the power given to another person is subject to the powers of the public prosecutor under art 145(3) of the Federal Constitution, it is valid.

[9] In *Abdul Hamid v Public Prosecutor* [1956] 1 MLJ 231; [1956] 1 LNS 3 Smith J held that:

> I do not consider that consent must be given personally by the public prosecutor. In my opinion the very general words 'rights and powers' appearing in section 376(iii) of the Criminal Procedure Code (FMS Cap 6) are sufficient to permit a Deputy

Public Prosecutor to consent to a prosecution under the Ordinance.

[10] In *Public Prosecutor v Mohd Noor bin Jaafar* [2005] 6 MLJ 745; [2006] 1 CLJ 103 held that:

> [16] Except in the cases in which the rights and powers must be exercised by the PP personally, in relation to the exercise of all or any of the powers vested in or exercisable by the PP under the CPC or any other written law, it is pertinent to note that s 3 of the Interpretation Acts 1948 and 1967 provides that the expression 'Public Prosecutor' means the Attorney General, and includes (within the scope of his authority) a DPP appointed under any written law relating to criminal procedure and also a person authorised by any such law to act as or exercise all or any of the powers of, the PP or a DPP.

The court further states that:

> The general words 'rights and powers' appearing in s 376(iii) of the CPC have been construed in *Abdul Hamid v PP* by Smith J who at p 232, left column, opined that consent need not be given personally by the PP but a DPP is permitted to do so. This view is further fortified in *Pai San & Ors v PP* where Abdul Hamid JCA (now FCJ) in delivering judgment of the Court of Appeal held, inter alia, that the consent to prosecute given by a DPP to a fishery officer to prosecute is valid and constitutional.

[11] In *Johnson Tan Han Seng v Public Prosecutor & associated appeals* [1977] 2 MLJ 66; [1977] 1 LNS 38, the Federal Court held that

> Still on the power of the Attorney-General, Mr Jagjit Singh (counsel in appeal No. 43) complains that the certificate or consent for the prosecution should have been signed by the Attorney-General himself and the fact that it was signed by a mere Deputy Public Prosecutor shows mala fides on the Attorney-General's part. Frankly I do not see merit in this argument. Section 80 ISA says that a prosecution for an offence under the Act punishable with imprisonment for seven years or more shall not be instituted except with the consent of the public prosecutor and s 376 of the Criminal Procedure Code says that, subject to certain exceptions, which do not apply here, a Deputy Public Prosecutor may exercise the rights and powers of the public prosecutor

[12] In *Public Prosecutor v Dato' Seri Anwar bin Ibrahim* [2014] 1 MLJ 633; [2014] 1 CLJ 354, the Court of Appeal held that:

> (1) The power of the PP to institute, conduct or discontinue any proceeding for an offence is prescribed by art 145(3) of the Federal Constitution. As for the CPC, there are two main provisions which deal with appointments which the PP is empowered to make in relation to criminal proceedings, namely ss 376(3) and 379. By virtue of s 376(3), the PP may appoint fit and proper persons to be DPPs, and a DPP so appointed may exercise all or any of the rights and powers vested under the

law unless the law expressly states that such power had to be exercised by him personally ...

[13] From the relevant authorities, it is trite law that the consent to institute the prosecution given to the DPP is valid and constitutional. It is clear from the reading of s 126(1) of the SIA that it does not mention that the PP must exercise such power personally.

Section 126(1)

(1) No prosecution for any offence under this Act shall be instituted except with the consent in writing of the public prosecutor.

[14] With the reading of s 126(1) of the SIA and s 376(3) of the CPC is very clear and without any ambiguity that the consent to institute the prosecution need not to be exercised personally by the PP. I find that the application for revision on the issue of consent for the dismissal or striking out of the two charges is unsustainable and has no merit.

NO WA-44–7–01 OF 2019 — REPEALED LAW MOTION

[15] The applicant also contended that the two charges were void in law as it were being brought under the SIA which has been repealed by the Capital Markets and Securities Act 2007 (CMSA). The charges alleged that the applicant has committed offences under s 89E(2)(a) of the SIA punishable under s 89E(4) of the SIA and to have been committed on 25 April 2007 and 27 April 2007. The applicant submitted that it is apparent the offences under the SIA have not been saved and or adequately saved by the CMSA because the section does not relate to the substantive issues of the offence under the SIA and s 390(2) of the CMSA only saves rights, privilege, obligations or liabilities that were acquired before the effective date of the CMSA ie 28 September 2007. Therefore the s 390 of the CMSA cannot be held to save the institute of the proceedings as that right or power was exercised only after the coming into force of the CMSA and not 'before the effective date' as stated in the said section.

[16] The applicant also contended that the CMSA does have an equivalent offence to s 89E of the SIA and should have been prosecuted under the s 188(2) of the CMSA. There is also a conflict between ss 381(2) and 390 of the CMSA as to the scope of the repeal of the SIA. This demonstrates that the savings provision of the CMSA would not save or adequately save the applicable provision under the SIA.

[17] The applicant further contended that the consent by DPP was instituted after the repeal of SIA and therefore it cannot be saved by s 390 of the

CMSA. Therefore the right to institute a prosecution under s 126 of the SIA had been repealed upon the coming into effect of the CMSA. The consent could not be saved by s 390 of the CMSA because the only matters that are saved by the CMSA are the procedural matters and not to the institution of the prosecution of an offence since it is a matter of substantive law and relates to a substantive right. The SIA and CMSA specifically provide that the consent in writing of the public prosecutor is required, full effect must be given to it and the consent of the public prosecutor himself is required for any prosecution under the Acts.

[18] To my mind saving provision in a statute is an exception of a special item out of general things mentioned in the statute. It is a restriction in a repealing act, which is intended to save rights, while proceedings are pending, from the obliteration that would result from an unrestricted repeal.

[19] First of all, s 381 of the CMSA provides as follows:

> 381 Repeal of Securities Industry Act 1983 and Futures Industry Act 1993 and savings and transitional in respect thereof
>
> (1) For the purpose of this Part —
>
> 'effective date' means the relevant date or dates, as the case may be, notified by the Minister under section 1;
>
> 'repealed Acts' means the Securities Industry Act 1983 and the Futures Industry Act 1993 so repealed under this Part.
>
> (2) The Securities Industry Act 1983 and the Futures Industry Act 1993 are repealed with effect from the effective date.
>
> (3) Notwithstanding subsection (2) —
>
> (a)(i) all regulations, orders, directions, notifications, exemptions and other subsidiary legislation, howsoever called; and
>
> (ii) all approvals, directions, decisions, notifications, exemptions and other executive acts, howsoever called, made, given or done under or in accordance with, or by virtue of, the repealed Acts shall be deemed to have been made, given, or done under, or in accordance with, or by virtue of, the corresponding provisions of this Act, and shall continue to remain in full force and effect in relation to the persons to whom they applied until amended, repealed, rescinded, revoked or replaced under, in accordance with or by virtue of, the corresponding provisions of this Act;
>
> (b) every direction, notice, guideline, circular, guidance note or practice note issued by the Commission or the Minister under the repealed Acts before the effective date and in force immediately before the effective date, shall be deemed to have been lawfully issued under this Act in relation to the particular provision of this Act corresponding to the matter dealt with in the direction, notice, guideline, circular, guidance note or practice note and shall remain in full force and effect until it is amended, rescinded or repealed under this Act;

(c) any application for an approval or consent, or for any other purpose whatsoever, or any appeal relating to such application, made by any person to the Minister or to the Commission under either of the repealed Acts before the effective date or dates, and pending immediately before the effective date or dates, shall, if there is a corresponding provision in this Act, be dealt with as if it was made under that provision and, if there is no such corresponding provision in this Act, such application or appeal shall lapse on the effective date or dates; and

(d) all transactions or dealings lawfully executed or entered into, and all business lawfully done, under or in accordance with any of the repealed Acts by a person who was licensed under the respective repealed Acts and who is licensed or deemed to be licensed in respect of a corresponding business under this Act, with any customer or other person, shall be deemed to have been lawfully and validly executed, entered into, or done, under and in accordance with this Act, and accordingly, any right or liability under such transaction, dealing or business existing, immediately before the effective date, shall be deemed to continue to be lawful and valid under this Act.

[20] The s 390 of the CMSA clearly spelled out a person's liability to be prosecuted or punished for offences or breaches committed under the repealed Acts. The s 390 of the CMSA reads:

390 Continuance of other rights, liabilities, etc., under the repealed Acts

(1) Nothing in the repealed Acts or this Act shall affect any person's liability to be prosecuted or punished for offences or breaches committed under the repealed Acts before the commencement of this Act or any proceeding brought, sentence imposed or action taken before that day in respect of such offence or breach.

(2) Any right, privilege, obligation or liability acquired, accrued or incurred before the effective date or any legal proceedings, remedy or investigation in respect of such right, privilege, obligation or liability shall not be affected by this Act and shall continue to remain in force as if this Act had not been enacted.

[21] It is to be noted that ss 28, 29, 30, 31 and 32 of the Interpretation Acts 1948 and 1967 must be read together with the above sections. They read as follows:

28 Subsidiary legislation unaffected by repeal of authorizing law in certain cases

Where a written law repeals in whole or in part any former written law and substitutes other provisions therefor, subsidiary legislation made under the repealed law shall, in so far as it is not inconsistent with the substituted provisions, remain in force until revoked or replaced by subsidiary legislation made under the repealing law, and shall be deemed for all purposes to have been made thereunder.

29 Repeal does not revive earlier repealed laws, etc.

The repeal of a written law shall not revive any written law or other thing not in force or existing immediately before the repeal took effect, and in particular

(without prejudice to the generality of the foregoing) the repeal of a written law which itself repealed an earlier law shall not revive that earlier law.

30 Matters not affected by repeal

(1) The repeal of a written law in whole or in part shall not —

(a) affect the previous operation of the repealed law or anything duly done or suffered thereunder; or

(b) affect any right, privilege, obligation or liability acquired, accrued or incurred under the repealed law; or

(c) affect any penalty, forfeiture or punishment incurred in respect of any offence committed under the repealed law; or

(d) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment, and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing law

(2) Without prejudice to the generality of subsection (1) —

(a) the repeal of a written law which adopts, extends or applies another written law shall not —

(i) invalidate the adoption, extension or application; or

(ii) prejudicially affect the continued operation of the adopted, extended or applied law; and

(b) the repeal of a written law which amends another written law shall not —

(i) invalidate the amendments made by the repealed law; or

(ii) prejudicially affect the continued operation of that other law as amended.

31 Repeal includes amending legislation

The repeal of a written law which has been amended by another written law includes the repeal of the amending law:

Provided that, where the amending law provides for matters other than the amendment of the repealed law, only those provisions of the amending law which effect the amendment shall be repealed by virtue of this section.

32 Expiry

Sections 28, 29, 30 and 31 shall apply on the expiry of a written law as they would have applied if that law had been repealed.

[22] Section 33 of the Interpretation Acts 1948 and 1967 (Consolidated And Revised 1989) (Act 388) makes it clear that the specific savings provisions in the written law, 'shall be without prejudice to the application of ss 28, 29, 30,

31 and 32 in respect of that law. Section 30 Act 388 stipulates that:

(1) The repeal of a written law in whole or in part shall not —

(a) affect the previous operation of the repealed law or anything duly done or suffered thereunder; or

(b) affect any right, privilege, obligation or liability acquired, accrued or incurred under the repealed law; or

(c) affect any penalty, forfeiture or punishment incurred in respect of any offence committed under the repealed law; or

(d) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment,

(e) and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing law had not been made.

(2) Without prejudice to the generality of subsection (1) —

(a) the repeal of a written law which adopts, extends or applies another written law shall not —

(i) invalidate the adoption, extension or application; or

(ii) prejudicially affect the continued operation of the adopted, extended or applied law; and

(b) the repeal of a written law which amends another written law shall not —

(i) invalidate the amendments made by the repealed law; or

(ii) prejudicially affect the continued operation of that other law as amended.

[23] In *Ong Lock Mui v Deputy Public Prosecutor* [1972] 1 MLJ 73 (ACRJ Johore Bahru), the appellant was charged in the Magistrate's Court at Johore Bahru with two offences under s 90(1) of the Income Tax Ordinance 1947 of failing without reasonable cause to furnish his income returns in respect of the years of assessment 1959 and 1966 within the period of 40 days as required by notices issued to him, and punishable under s 90(2) of the Income Tax Ordinance 1947 ('the Ordinance'). He claimed trial. At the conclusion of the trial he was convicted and fined $100 on each charges. The appellant's counsel arguments are to the following effect. As on the day the notices were issued to him the Ordinance and all its subsidiary legislation had been 'wholly repealed and revoked' his conviction on the charges against him could not be in respect of offences known to law; by reason of the first limb of s 29 of the Interpretation Act, 1967 the repeal had the effect of obliterating the Ordinance and its subsidiary legislation. At the same time, he says, he does not dispute that the Ordinance and its subsidiary legislation are still in force and that the Comptroller-General of Income Tax can still ask for statements under s 61A of

the Ordinance, but he maintains that after 1968 when the Income Tax Act 1967 ('the Act') came into force, the Comptroller-General must apply the provisions of the Act as by s 77 of the Act he is empowered for any year of assessment to require any person by notice in writing to furnish him with a return in the prescribed form.

Syed Othman J stated as follows:

> The first limb of s 29 of the Interpretation Act 1967 provides that *the repeal of a written law shall not revive any written law or other thing not in force or existing immediately before the repeal took effect*. I cannot see how Mr Ong can come to rely upon this provision since he has agreed that the Ordinance and its subsidiary legislation are still in force. *In any case the rule that the effect of repealing a legislation is to obliterate it completely applies only where there are no express saving provisions in the repealing legislation*. This rule is stated by Collins, MR in I*n re R* [1906] 1 Ch 730 at p 736 when he considered the question whether s 5 of the Trustee Act, 1850 which applied to property held by a criminal lunatic, was wholly repealed by section 342 of the Lunacy Act, 1890 which does not deal with criminal lunatics. I need only cite the principles in that case which I consider to be applicable to the present case. He said:
>
> > There were one or two other cases cited which have an important application to the present case, that is to say, cases where you find in an Act a repealing clause followed by a saving clause. There you have to see how far the two enactments can co-exist. It seems to me that the principle laid down in those cases is applicable to the present case. And that principle is this: *Where you have a repeal and you have also a saving clause, you have to consider whether the substituted enactment contains anything incompatible with the previously existing enactment*. The question is, Aye or No, is there incompatibility between the two? And in those cases the judges, *in holding that there was a saving clause large enough to annul the repeal, said you must see whether the true effect was to substitute something incompatible with the enactment in the Act repealed; and that, if you found something in the repealing Act incompatible with the general enactments in the repealed Act, then you must treat the jurisdiction under the repealed Act as pro tanto wiped out*. That is settled by the cases of *Re Busfield* (1886) 32 ChD 123 at 131–132, and *Hume v Somerton* (1890) 25 QBD 239. (Emphasis added.)

In the present case the provisions of s 156 of the Act and para 3(1) of Schedule 9 to the Act are clear and unequivocal. They expressly save the Ordinance and its subsidiary legislation.

[24] In the case of *Public Prosecutor v Low Ah Sang* [1962] 1 MLJ 13 ACRJ KL, Hashim J stated this:

> In *Henshall v Porter* (1922–3) 39 TLR 409 it was ruled that the repeal of section 2 of the Gaming Act, 1835 by section 1 of the Gaming Act, 1922 did not prevent the bringing of proceedings under the repealed section after the date when the repealing section came into operation in respect of a cause of action which arose before that

date. McCardie J., in his judgment, said: 'In my opinion the Act of 1922 must be considered in the light of the settled, recognised and beneficient rule of law that existing rights are not to be deemed destroyed by a statute unless there be express words or the plainest implication to that effect. I need not cite the overwhelming body of authority as to this.' The learned Judge went on to say: 'I beg most respectfully to say that in my opinion it is important to maintain the rule of law that existing rights are not to be deemed destroyed unless an Act of Parliament is clear to that effect.' The Emergency Regulations (Indemnity) Act No. 24 of 1960, which, as the preamble says, was meant 'to provide for certain other matters arising out of the cesser of such Ordinance, (that is to say, the Emergency Regulations Ordinance, 1948) pursuant to the provisions of Article 163 of the Constitution' and which was brought into force on 1 August, 1960, by section 11 saved all proceedings by or on behalf of the Government against any person in respect of any matter whatsoever. In my opinion, even if the Emergency Regulations had expired by effluxion of time, section 11 of Act No. 24 of 1960 would have preserved the rights of the Government to institute prosecutions and enforce penalties. For these reasons I hold that a prosecution would now lie for an offence committed under the Emergency Regulations, 1948 when the Regulations were in force.

[25] Further, the case of *Low Ah Sang* had referred to two cases from the House of Lords and two cases from India as follows:

They are *Wicks v Director of Public Prosecutions* [1947] AC 362 and *Postlethwaite v Katz* 59 TLR 245. Viscount Simon's judgment in *Wicks v Director of Public Prosecutions* seems to make it quite clear that a prosecution for an offence under a repealed Act can be commenced and a conviction had even after repeal. The effect of repeal is set out in section 13 of the Interpretation and General Clauses Ordinance No 7 of 1948. It keeps alive all obligations and the liabilities to penalties and the right to institute and carry on legal proceedings and enforce penalties. This section is identical in terms with section 38 of the English Interpretation Act, 1889 and section 6 of the Indian General Clauses Act of 1897. In *Postlethwaite v Katz* it was held that a charge could be brought for an alleged offence against the order of 1939 committed while the order was in force although the proceedings were not begun until after the order had been revoked. In *Re TS Chockalingam* AIR 1945 Madras 521 it was held that the appellant, the editor of a vernacular daily paper 'Dinasari', was rightly convicted though at the time of his prosecution there was no law in the statute book under which he had committed any offence in respect of the acts complained of. Kuppuswami Ayer J in his judgment said, inter alia, 'the question as to whether an offence was committed or not depends on the state of the law when the offence was committed and not on the law as it is on the date on which the prosecution is started.' In The *Public Prosecutor v Bondada Ramalingeswaraswamy* AIR 1949 (Madras) 271 it was ruled that the repeal of section 7 of the War Risks (Goods) Insurance Ordinance [IX (9) of 1940] did not take away the right which the Crown had to initiate prosecutions for an offence committed when section 7 had been in force.

[26] In *Tengku Dato' Kamal Ibni Sultan Sir Abu Bakar & Ors v Bursa (M) Securities Bhd and another appeal* [2013] 1 MLJ 158, the Court of Appeal held:

[56] The predecessor of s 360 of the CSMA 2007 was s 100 of the SIA, which was designed to deal with breaches of the law relating to dealing in securities. Section 360 of the CMSA 2007 which is substantially the same with s 100 of the SIA, *came into effect on 28 September 2007 repealing the whole of* s 100 of the SIA. On this issue, we are in agreement with the learned High Court judge when he said:

> In my view this submission or argument is misconceived. *Section 390(1) of the CMSA preserves the right of the plaintiff to take action against any person liable to be prosecuted or punished for offences or breaches committed under the repealed legislations before the commencement of the CMSA 2007, since the liability of such person under the repealed legislations is not affected by the repeal. This is further fortified by the provision of sub-s (3) of s 390 of the CMSA 2007 which provides that remedy or investigation in respect of such right, privilege, obligation or liability shall not be affected by this Act (ie CMSA 2007) and shall continue to remain in force as if this Act had not been enacted. What is more important to note is that under s 381(3) of the CMSA 2007 it is provided that all decisions, directions or notifications made, given or done under the repealed legislations shall be deemed to have been made, given or done under or in accordance with the corresponding provisions of the CMSA 2007*. Now, the corresponding section in SIA 1983 (one of the repealed legislations) was s 100. The defendant's counsel conceded, in para 3.15 of her written submissions in encl 9, that s 360 of the CMSA 2007 and s 100 of the SIA 1983 is substantially the same. In this case the plaintiff had taken action against the defendants and had imposed penalties on them in 2005. *Thus by virtue of these two provisions ie ss 381(3) and 390 of the CMSA 2007 the action and the decision to impose penalties survive the repealed legislation* as if they were made or imposed under s 360 of the CSMA 2007.

[57] That is the correct reading of the relevant provisions of the laws on the issue. We find no reason to disagree with him. We shall adopt the same reasoning on the same issue for the purpose of the present appeal before us.

[27] It is to be noted that the Preamble of the CMSA provides that the CMSA is an Act that consolidates both the SIA and the Futures Industry Act 1993. It is also to regulate and to provide for matters relating to the activities, markets and intermediaries in the capital markets, and for consequential and incidental matters.

[28] Further, s 17A of the Interpretation Act provides that, in interpreting a provision of an Act, it is the construction that would uphold the purpose or object underlying an Act is to be preferred as compared to a construction that would not promote the purpose or object of the Act, regardless if the very purpose or object is not expressly stated in the Act.

[29] Section 390(1) of the CMSA clearly provides as that nothing in the repealed Acts or this Act shall affect any person's liability to be prosecuted or punished for offences or breaches committed under the repealed Acts before

A the commencement of this Act or any proceeding brought, sentence imposed or action taken before that day in respect of such offence or breach. Interpretation Act must be read together.

B **[30]** From the reading of the s 390(1) and (2) of the CMSA as a whole, it is apparent that the offences under the SIA have been saved and adequately saved by the CMSA. In my view, the saving provision does relate to the substantive issue of the offences under the SIA.

C **[31]** I also find there is no merit in the applicant's contention that there is a conflict or inconsistency between s 381(2) and 390 of the CMSA as to the scope of the repeal of the SIA. The purpose of the CMSA as reflected in the preamble clearly for the purpose to consolidate the SIA and Futures Industry Act 1993 [Act 499], to regulate and to provide for matters relating to the D activities, markets and intermediaries in the capital markets, and for matters consequential and incidental thereto. To interpret different would not be, in my opinion, not in consonant with s 17A Act 388:

> E In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.

F **[32]** In this case, the criminal proceedings against the applicant were initiated on the date of the charges, which were 20 July 2012. The applicable law as at 20 July 2012 was the CMSA. I am of the view that the offence under s 89E of the SIA is still reflected in s 188 of the CMSA where it prohibits the conduct of person in possession of inside information. The offences under the CMSA are the mirror of the offences under the repealed SIA. The institution of G the prosecution which was made under s 126 of the SIA, based on the provision under s 390 of the CMSA and also under s 30 of the Interpretation Act. Thus, the saving provisions of the CMSA would save or adequately save the applicable provisions under the SIA. Therefore, I find that the consent by the DPP is still valid, although SIA was repealed, by virtue of s 390 of the CMSA H as to the continuance of other rights, liabilities, etc, under the repealed Acts.

I **[33]** Based on all of the above, it is apparent that all the offences and subsidiary legislation under the SIA have been saved by the CMSA. The counsel for the applicant's argument and reference is therefore misinterpretation. Therefore, I find that the application for revision on the issue of repealed law for the dismissal or striking out of the two charges is also unsustainable and has no merit.

NO WA-44–8–01 OF 2019 — DOCUMENTS MOTION

[34] The jurisprudence in relation to s 51 of the CPC is not controversial. Apart from satisfying the dual requirements of necessity and desirability as provided under s 51 itself, the stage at which the application for disclosure is made is of primary importance. If the application is made before the commencement of the trial, the disclosure is limited to matters as stated in the charge. Anything more would be tantamount to the defence having inspection of the evidence of the prosecution prior to trial. Pre-trial disclosure in criminal cases cannot be equated to the pre-trial discovery and inspection of documents in a civil proceeding. In exercising the discretion under s 51 of the CPC, the court must have regard to the justice of the case (see *Raymond Chia* and *Anwar Ibrahim*).

[35] The entitlement of the accused, under s 51 of the CPC, to any document or copies of documents or other materials in the possession of the prosecution is entirely at the discretion of the court, having regard to the justice of the case and as to how this discretion is to be exercised is clearly explained in *Dato' Seri Anwar bin Ibrahim v Public Prosecutor* [2010] 2 MLJ 312; [2010] 4 CLJ 265. The exercise of the court's discretionary power under s 51 has been limited and the section construed strictly.

[36] Now the applicant seeks for an order of discovery that summon be issued to the PP and SC to produce and or deliver all statements recorded (investigation statements) during the investigation that resulted the applicant being charged. The production of the investigation statements would be in accordance with the applicant's right to a fair trial. Thus, it would be an unfair evidential and procedural advantage over the applicant if those statements are not disclosed prior trial. On the other hand, the learned DPP submitted that the Investigation Statements in question ought not to be disclosed as it was against the public interest in that such disclosure would prejudice the prosecution in the investigation.

[37] In *Syed Abu Bakar bin Ahmad v Public Prosecutor* [1982] 2 MLJ 186; [1984] 1 CLJ Rep 368 it was held that s 51 does not allow an accused to ask for discovery of documents or inspection of documents seized by the police in the course of their investigation since to do so would be tantamount to inspection of the evidence of the prosecution by the defence prior to the trial.

[38] The law governing the supply of such statements to an accused before trial, as stated in *Husdi v Public Prosecutor* [1979] 2 MLJ 304; [1980] 1 LNS 33 is free from ambiguity. An accused is not entitled to copies of police statements recorded from witnesses in the course of investigations. First, a

statement taken from a witness is a privileged document. Secondly as a matter of public policy, it is not desirable for the prosecution to provide the accused with such statements as there is a real danger of tampering with witnesses.

[39] To my mind the application by the applicant is to excess the Investigation Statement to prepare for his defence. One settled principle attached to the application for discovery under s 51 of the CPC is that, at this pre-trial stage, a roving and fishing inquiry for evidence is not permissible. A catch all net cannot be cast. The appellant is not entitled to know by what means the prosecution proposes to prove the facts underlying the charge he faces. This remains the prerogative of the prosecution (see *Anwar Ibrahim*'s case).

[40] The applicant refer the case of *Siti Aisyah v Public Prosecutor* [2019] 4 MLJ 46; [2019] 1 LNS 353 which involved with the application for discovery of documents during the defence stage and not before the commencement of the trial as in the present case before me. Thus if the application is made during the trial, the applicant would be entitled to discovery if the documents satisfy the test of relevancy and is essential for adjudication based on evidence before the court. I find that Siti Aisyah case is not applicable since the application is made before the commencement of the inquiry or trial, as in the present case. The general rule is that the request must be directed at a specific document where in this case the applicant failed to do so. The Federal Court decision in *Dato Najib*'s case is bound to be followed in respect of the disclosure of investigation statement.

[41] Accordingly, I disallowed the revision of this motion of discovery of investigation statements.

DECISION

[42] For the reasons discussed above, there was no real substance in this application to merit my revision and no substantial justice or miscarriage of justice has been done when the SCJ dismissed the applicant's case. In the light of such dismissal, after having evaluated the submission from both parties, I am also of the opinion that the power of SCJ to acquit and discharged the applicant prior to the trial is no longer an issue. I find that the SCJ has judiciously exercised the application and had taken the relevant factors into consideration in not allowing such applications. Accordingly, the motions as in *Notis Usul No*: WA-44–6–01 of 2019, *Notis Usul No*: WA-44–7–01 of 2019 and *Notis Usul No*: WA-44–8–01 of 2019 are disallowed and the order by the SCJ is affirmed and the criminal trial is to be proceeded with.

Motions disallowed and order of SCJ affirmed.

Reported by Ahmad Ismail Illman Mohd Razali